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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re RICHARD W. BROWN, on Habeas Corpus.	2d Crim. No. B201514 (Super. Ct. No. CR15134) (Ventura County)

Richard W. Brown petitions this court for a writ of habeas corpus following the Governor's reversal of a Board of Parole Hearings (Board) decision which had found Brown to be suitable for parole. We conclude that the Governor's reliance on the facts of the commitment offense, by itself, is insufficient to overturn the Board's decision. Brown's petition for writ of habeas corpus is granted. We vacate the Governor's decision and remand the matter to the Governor.

FACTS

On November 10, 1979, Brown, 22 years of age, decided to gamble. He lost $500 to Lester McLucas in a card game. He paid McLucas some of the money, but he owed $370.

The next day McLucas went to Brown's apartment to collect the debt. McLucas drove Brown and another man to a place where Brown said "he could obtain the money." McLucas had threatened Brown's family over this gambling debt, and

Brown was afraid of him. He knew that McLucas "had spent time in prison for assaulting and stabbing a young girl."

After reaching the location, Brown attempted to exit the vehicle. McLucas grabbed him. Brown shot McLucas, who died from multiple gun shot wounds to the head.

Two days later Brown turned himself in to the police. He was convicted of second degree murder and sentenced to a term of 15 years to life.

In his earlier years in prison, Brown had disciplinary problems. But he "has been discipline-free since 1989 . . . ."

The 2004 Parole Board Hearing

At his 2004 parole hearing, Brown said that his act of killing McLucas was based on "fear and anger." He said, "I take personal responsibility for the crime I committed. I remorsefully apologize for my irrational behavior that led to his fatal death."

The Board found that Brown was suitable for parole and "would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison . . . ." The Board determined that Brown had made substantial rehabilitative progress while in prison. It noted, among other things, that: 1) he had "participated in numerous self-help programs," 2) he obtained his "GED," 3) he participated in Alcoholics Anonymous, 4) he "completed the Life Plan Substance Abuse Program in 1993," 5) he had twice completed anger management programs, 6) he had participated in the Muslin Fatherhood Program, and 7) he worked as a drug counselor.

The Board also found that Brown had realistic parole plans, he maintained close family ties, exhibited signs of remorse and "has understanding for the gravity of the crime that he committed." Apart from the commitment offense, it found that Brown "lacks a significant criminal history of violent crime." The Board noted that Brown's most recent psychiatric evaluation indicated that his "violence potential is estimated to be no greater than that of the average citizen in the community." An earlier evaluation indicated that Brown's "prognosis for successful adjustment in the community is good."

The Governor's 2005 Reversal

In 2005, the Governor reversed the Board's decision. He found that "based upon the gravity of the murder, Mr. Brown would presently pose an unreasonable risk to public-safety . . . ." The Governor noted that Brown "had availed himself of a wide array of self-help and therapy" and had made realistic parole plans. He also found that Brown had received "positive evaluations from institutional staff and mental-health evaluators, which, for the past few years, have generally considered Mr. Brown to be a low risk to public-safety if paroled." But the Governor did not accept Brown's claim that he was acting out of fear or self-defense. He said "even if Mr. Brown's version were believable and happened as he has described, it does not justify his violent reaction or the brutal manner in which he killed the victim."

The 2006 Parole Board Decision

In 2006, the Board found that Brown was "suitable for parole and wouldn't pose an unreasonable risk of danger to society or a threat to public safety if released . . . ." It said that he had participated in self-help, rehabilitation and substance abuse programs. Apart from the commitment offense, it found he did not have a significant history of violent crime, he had realistic parole plans and a reduced probability of recidivism. The Board found he had positive institutional behavior, had shown signs of remorse and that he understood the nature and magnitude of his offense.

During the parole hearing, Deputy Commissioner Sellwood noted that Brown's psychological reports were favorable. He said one report indicated that Brown had no mental disorders and a Global Assessment of Functioning (GAF) score of 90. Sellwood said, "[I]t's kind of like an A minus."

In the most recent psychological report, staff psychologist E. W. Hewchuk concluded, "Due to the close family support, inmate Brown should have no problems complying with parole requirements. His release plans are both viable and realistic, and the prognosis for a successful adjustment in the community is good. [¶] . . . [¶] If released to the community, inmate Brown's violence potential is estimated to be no greater than that of the average citizen in the community." Hewchuk said Brown "does

not have a mental disorder which would necessitate treatment . . . following parole." His "clinical record during incarceration reflects good institutional adjustment, with no evidence of any violent behavior."

The Governor's 2007 Reversal

In March of 2007, the Governor reversed the Board's decision. He said that Brown "received favorable evaluations from various correctional and mental-health professionals over the years" and had "close ties with supportive family and friends." "As I noted in my 2005 decision . . . , in addition to remaining discipline-free since 1989, Mr. Brown made efforts to enhance his ability to function within the law upon release."

The Governor found, however, that "the gravity of the murder perpetrated by Mr. Brown presently outweighs the positive factors." He said, "Although Mr. Brown now says he accepts responsibility for his actions and is remorseful for the murder, based on the record before me, I do not accept Mr. Brown's version of events." The Governor noted that before he shot McLucas, Brown held a gun to the victim "and demanded 'the money.'" The Governor found that "*[t]he gravity of the second-degree murder committed by Mr. Brown is alone sufficient for me to conclude presently that his release from prison would pose an unreasonable public-safety risk.*" (Italics added.)

Brown filed a petition for writ of habeas corpus in the Ventura County Superior Court. In June of 2007, the court upheld the Governor's decision and denied the petition. The instant petition for habeas corpus relief was filed here.

DISCUSSION

I. *Overturning the Board's Parole Decision*

The Attorney General claims that the Governor's reversal of the Board's decision in entitled to deference by the courts and it must be upheld in this case. We disagree.

Under state law, "release on parole is the rule, rather than the exception." (*In re Smith* (2003) 114 Cal.App.4th 343, 351.) The Board must release a prisoner who has served the required minimum term unless the Board determines that "'consideration of the public safety requires a more lengthy period of incarceration . . . .'" (*Ibid.*) Here

the Board twice ruled that Brown was suitable for parole. The Governor reversed both of those decisions.

The Governor has authority to reverse a decision of the Board to grant parole. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 660-661.) He has substantial discretion to weigh the relevant factors involving an inmate's history and rehabilitation in deciding whether the prisoner is suitable for parole.

But that discretion is not unlimited. "[A] petitioner is entitled to a constitutionally adequate and meaningful review of a parole decision . . . ." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1205.) The courts must review the Governor's findings to make sure that they are based on evidence in the record. He may not rely on speculation or assumption. (*Id*. at p. 1213.) If the Governor's decision is not consistent with the applicable legal standards or "is not supported by some evidence in the record and thus devoid of a factual basis, the court should grant the petitioner's petition for writ of habeas corpus . . . ." (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 658.)

A. *Commitment Offense Facts and Evidence of Current Dangerousness*

Here the Governor concluded that the gravity of Brown's offense "is alone sufficient" to deny parole. He assumed that the aggravated nature of the offense is sufficient by itself to support a finding that the inmate is currently dangerous and not suitable for parole. But that is not the case.

The Governor may certainly consider the "circumstances of the commitment offense." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1214.) But "the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public . . . ." (*Ibid.*) Consequently the Governor may not rely solely on the facts of the crime to deny parole. (*Ibid.*)

Because the Governor relied on the facts of the commitment offense as the exclusive basis for denying parole, we vacate his decision.

II. *Remand*

The Attorney General contends that this matter should be remanded to the Governor. He notes that the Governor rendered his decision prior to the California

Supreme Court's decision in *In re Lawrence*. At the time he made his decision to reverse the Board, there was a line of appellate cases that held that parole could be denied solely on the basis that the commitment offense was especially egregious. The Governor may have relied on this line of cases, which was later overruled in *In re Lawrence*, and he may have consequently assumed that he did not need to set forth any additional grounds to support a denial of parole.

The Attorney General notes that although the express reason for denying parole was the nature of the commitment offense, the Governor also stated, "Although Mr. Brown now *says he accepts responsibility for his actions* . . . , I do not accept Mr. Brown's version of events." (Italics added.) The Attorney General contends that remand is necessary to determine whether the Governor was attempting to claim that the commitment offense was more egregious than Brown claimed, or that Brown lacked insight about the nature of his crime. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1260 [parole may be denied on the ground that the inmate lacks insight about his or her offense and its consequences].)

At oral argument, Brown's counsel objected to a remand. She claimed that the Governor and the Attorney General's Office had a pattern and practice on remands of making frivolous *Shaputis* lack of insight findings on cases with no evidence of current dangerousness. She said she believed that they will set forth any finding to deny parole solely to support the Governor's agenda of refusing to release prisoners. But these are serious accusations that state officials are deliberately violating their constitutional duties. Counsel has neither cited to the record, nor has she presented any evidence to support her claims that there is such a pattern or practice.

Absent evidence to the contrary, we must presume at this stage that the Governor and the Attorney General will act in good faith. We will also presume: 1) that on remand the Governor will candidly acknowledge whether he intended to rely solely on the facts of the commitment offense to deny parole, and, if so, that he will sustain the Board's decision; or 2) if he intended to rely on another factor, that he will so state, and

he will make findings based solely on his assessment of the evidence in this record. (*In re Ross* (Feb. 10, 2009, C057249) __ Cal.App.4th __ [2009 D.A.R. 1944, 1951-1952].)

The petition for writ of habeas corpus is granted. The Governor's decision is vacated and the matter is remanded to the Governor.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

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